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No. 91-993

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Petition For Writ of Certiorari In The United States Court of Appeals For The Second Circuit

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REPLY BRIEF OF PETITIONERS

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STATEMENT OF REPLY ISSUES

INTRODUCTION

Mobil has raised two issues for the first time relative to this Petition in its Brief:

1. Is a buyer who is required to pay a discriminatorily higher price damaged under the law only where the favored buyer applies the substantial discrimination to a lower resale price; and

2. Is a quantification of damages under *Robinson-Patman* which ultimately equates to the amount of the discrimination, even when supported by independent expert testimony, condemned as being "automatic damages".

The arguments of Mobil, and the confusion in the lower courts, regarding each of these issues presents the threat of a substantial erosion of the protections intended by the Federal *Robinson-Patman Act*, 15 U.S.C. §13(a).

ARGUMENTS

I. WHETHER A DISCRIMINATION RESULTS IN AN OVERCHARGE OR UNDERCHARGE IS IRRELEVANT TO THE ULTIMATE EXISTENCE OF COMPETITIVE DAMAGE.

The essence of Mobil's claim that Mr.

Tolokan has suffered no damages, and that competition has not been injured,[1] rests upon the argument that any damages claimed to have been suffered must be calculated considering only the competitive effect of Aldin's lower price, without regard to the higher discriminatory price which Mobil exacted of Mr. Tolokan. Mobil extrapolates this illogical concept from the Opinion of Justice Cardozo in the case of *ICC v. United States*, 289 U.S. 385, 53 S. Ct. 607, 77 L. Ed. 1273 (1933).

An examination of *ICC v. United States*, shows that the holding, and each of the cases cited therein, relate uniformly to *regulated prices/rates* rather than to free market conditions. In each of those rate cases the "price" (i.e. rate) being charged to the plaintiff (the disfavored buyer) was the established rate set by a rate making authority. In each of those cases the regulated rate charged to the disfavored plaintiff was held to be "reasonable", even though the rate charged to the favored

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[1] Which is contrary to the jury's findings of injury to competition. (Verdict Form, App. B, Question 4.)

buyer was discriminatorily lower, e.g. *ICC v. United States*, *supra*, at 390. Since the rate charged to the disfavored buyer was, as a matter of law, "reasonable" (since set by regulation), the determination regarding the existence of damages in those cases was necessarily limited to a determination of the competitive effect which the *lower* rate charged to the preferred buyer had on competition.

The logic of the rate setting cases has no applicability to a free market scenario, however. In a free market, as is the case herein, a seller such as Mobil determines the prices which it charges to its purchasers without regard to regulation by any administrative agency.[2] Unlike the rate cases, the higher prices charged to Mr. Tolokan, in a free and unregulated market, cannot be deemed to be, as a matter of law, "reasonable". Therefore, all relevant facts and circumstances must be examined in order to determine whether or not a buyer who has suffered a discrimination, found to have resulted

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[2] Though petroleum products have, at times, been subject to governmental regulation, that is not a relevant issue in this case.

in injury to competition generally, has suffered damages. This inquiry cannot properly be limited to the sole determination of whether or not the favored purchaser has applied the benefits of its lesser acquisition price to its retail price, and thereby taken away the disfavored purchasers customers, or required the disfavored purchaser to price at a lower level. While such a limitation may be appropriate in the case of regulated prices, it is manifestly inappropriate to discriminations occurring in a free and unregulated marketplace.

The theory behind the inapplicable regulatory cases is clearly that the disfavored buyer obtained the rate which the law stated he was entitled to. Therefore, he could have only suffered damage if the lower price afforded to the favored buyer resulted in competitive injury to him. With a regulated rate, the "overcharge" referred to by Justice Cardozo in *ICC v. United States* could never have occurred. Conversely, in the unregulated marketplace where Mobil, Aldin and Mr. Tolokan did business, the discrimination which occurred

may be properly characterized as *either* an overcharge to Mr. Tolokan, or an improper lower price to Aldin. Mobil's attempt to limit the concept of damages to the principal of the lower price received by Aldin, to the exclusion of the consideration of the effects of the discriminatory overcharge suffered by Mr. Tolokan, is therefore wholly inappropriate. To permit such a claim would improperly allow a violator of the antitrust laws to avoid liability arising from the clear and reasonably foreseeable effects of its discrimination. *J. Truett Payne*, *supra*, at 1929; *Bigelow*, *supra*, at 264-265.

The record shows that the substantially favored price afforded to Aldin provided it with great marketing latitude, allowed it to basically ignore customary price-volume considerations, maximize its profits on each gallon of gasoline which it sold by using the discrimination, and expend considerable sums in the remodeling of its facility. As a direct result of Mobil's discrimination, Mr. Tolokan was deprived of these opportunities. Had Mr. Tolokan been afforded the

pricing and profit opportunities Mobil afforded to Aldin, he could have lowered his price, generated additional profits and capital, modernized his facility, installed self-service and new tanks, etc. and thereby have been more competitive. (January 11, 1991 Tr. pp. 67-72, 83-84; January 16, 1991 Tr. pp. 18-22; 186.)

In such circumstances:

> "It is unnecessary that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition." *Foremost Dairies, Inc. v. F.T.C.*, 62 F.T.C. 1344, 1352 (1963) *aff'd.* 348 F.2d 674, 680 (5th Cir. 1965), *cert. den.* 832 U.S. 959.

In *Foremost*, the Court found (at page 680) that the existence of injury could be properly inferred where the discriminatory reduction afforded to the favored buyer a significant aggregate saving that, *if* reflected in a resale price cut, would have had a noticeable effect on the

purchasing decisions of customers. This was irrespective of whether such retail price cuts were actually afforded by the favored buyer.

To adopt Mobil's argument would allow discriminating sellers to afford substantial marketing benefits to favored buyers, which benefits have no relationship whatsoever to market efficiencies, meeting competition, the actual functions performed by favored buyers, or cost justifications. Such unjustified discriminations have been uniformly condemned. *Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990).

Following Mobil's argument, the only act that would have to be performed by a favored purchaser in order to insulate both it, and its discriminating seller, from antitrust liability would be to set its resale prices at a level comparable to, or above, the disfavored buyer. Regardless of the substantial additional profits which would be reaped by such a potentially inefficient favored buyer, a discriminating seller and its favored buyer could wholly avoid liability while effectuating a discrimination

which was otherwise indefensible. If the favored buyer departed from its "insulating activities", the discriminating seller could simply alter its price to that of the disfavored buyer in order to restore uniformity and avoid antitrust liability. Such a situation would hardly advance the intended purposes of the antitrust laws.

A determination by this Court is therefore required in order to determine the issue of whether a disfavored buyer is barred from suffering antitrust damages unless the favored buyer applies the discrimination directly to lower resale prices,[3] rather than applying the discrimination to substantially increased profit margins.[4]

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[3] *See e.g.: Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990); *Enterprise Industries v. Texas Co.*, 240 F.2d 457 (2d Cir.) *cert. den.* 353 U.S. 965 (1957), holding that no antitrust injury occurs unless the discrimination is reflected in lower resale prices.

[4] *See e.g.: Kroger Co. v. F.T.C.*, 438 F.2d 1372, 1378 (6th Cir. 1971); *National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517, 522 (7th Cir. 1968); *Beatrice Foods Co. et al.*, 76 F.T.C. 725, 803 (1967); *E. Edelmann & Co. v. F.T.C.*, 239 F.2d 152, 155 (7th Cir. 1956), holding that where a substantial and long term discrimination existed, antitrust damage occurs regardless of whether the favored buyer undersells competitive rivals, recognizing that the favored buyer can achieve a more sound competitive

II. THE "AUTOMATIC DAMAGES RULE" DOES NOT PRECLUDE USE OF THE AMOUNT OF THE DISCRIMINATION TO QUANTIFY ANTITRUST DAMAGES, OR TO SUBSTANTIATE THE FACT OF INJURY.

Mobil claims that Mr. Tolokan seeks to prove both the existence of antitrust injury, and the quantification of that injury, through the application of an "automatic damages rule". Mr. Tolokan seeks to do neither. Mobil merely attempts to blur the distinction between the importance of the "fact" of injury, which is subject to proper inference and presumption, and the quantification of damage. Knowing that the improper consideration of the meeting competition defense prevented the jury from ever reaching the question of proper quantification of damages, Mobil has nevertheless attempted to inject this issue in order to avoid consideration by the Court.

In order to recover treble damages under Section 4 of the *Clayton Act*, after having made the requisite

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operation long term, while minimizing or ignoring generally applicable competitive factors effecting the competitive abilities of its disfavored competitors.

showing that Mobil's discriminations may have lessened competition, Mr. Tolokan was required to show that his business had been injured in a manner causally connected to the discrimination. Once the existence of such injury had been proven, evidence was required to be submitted to quantify the amount of those damages. However, evidence as to the amount of such damages may be less precise. *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 451 U.S. 557, 558, 565-567 (1981). In *J. Truett Payne* the discrimination complained of related to sales quota rebates which were claimed to have been discriminatorily applied in a manner unfavorable to the plaintiff. No evidence was presented quantifying the alleged discrimination on a per unit basis. The plaintiff presented no documentary evidence regarding the effect of the alleged discrimination on either the plaintiff's or its competitors' retail prices. *J. Truett Payne*, *supra*, at 559-560, 563-564. Rather, the plaintiff merely relied upon the application of the "automatic damages" rule to meet its burden of proof regarding not only the existence of

antitrust injury, but the quantification of that injury as well.

The evidence presented in this case goes far beyond any attempt to show the existence of antitrust injury, or to quantify those damages, through the mere application of an automatic damages rule. First, there is a clear presumption that injury occurred under the facts herein. *Texaco, Inc. v. Hasbrouck*, *supra*, at 2551;[5] *see* Petitioner's brief at pp. 19-23. It is also appropriate to show the existence of antitrust injury by comparing the profit margins available to a disfavored plaintiff against the profit margins made available to the favored buyer as a result of the discrimination. Where those profits available to competitors are at variance as a *result* of the discrimination, the evidence is sufficient to support a "just and reasonable inference" of injury. *J. Truett Payne, supra*, at 566, citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

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[5] Holding that there was "no doubt" that plaintiffs' proof of a continuing discrimination throughout a nine year period was sufficient to show injury.

Herein Mobil's argument is based totally upon the claim that, in ultimately quantifying the damages suffered by Mr. Tolokan as a result of the discrimination, Mr. Tolokan's expert was of the opinion that the most accurate way to determine such damages, using the fewest assumptions, would result in a damage figure equal to the amount of the discrimination. The cases condemning the mere mathematical application of an automatic damages rule do not stand for the proposition that a calculation, otherwise supported by relevant evidence and expert testimony, is to be condemned simply because the ultimate quantification equates to the actual amount of the discrimination. The only process which those cases condemn is the use of a mathematically computed automatic damages amount "without more". *J. Truett Payne, supra,* at 565-567. The law requires a plaintiff to provide adequate evidence to support its injury and damages quantification theories, rather than merely applying an automatic damages computation. Mr. Tolokan has provided extensive evidence in that regard.

Having met his burden of proving the existence of injury attributable to the discrimination, a less rigorous standard is applicable to the quantification of those damages. *J. Pruett Payne*, *supra*, at pp. 566-7; *Bigelow*, *supra*, at 580. In that regard, Mr. Tolokan's expert provided alternate theories quantifying the damages suffered. The first theory, which Mr. Tolokan's expert supported through extensive graphs and underlying documentation, supported the expert's logical opinion that the amount of damage incurred by Mr. Tolokan was equal to the discrimination since, if Mr. Tolokan had maintained his retail pricing practices, it was reasonable to expect that his volume of past sales would have remained unaltered, and his margin of profit would have increased commensurate with the amount of discrimination which Aldin had been favored with.[6]

Mr. Tolokan's expert also presented two alternate theories, resulting in a greater amount of damages being

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[6] This method of computation was approved by the Court in *Bigelow v. RKO Radio Pictures, Inc.*, *supra*, and again in *J. Truett Payne*, *supra*.

computed. However, the expert testified that the preferred theory was that first presented because of the limited assumptions necessarily applicable to the first alternate theory. However, both the first ($425,587.42) and second ($462,000) theories were stated to be sound.

It is therefore abundantly clear that Mr. Tolokan has not sought to apply a mere mathematically computed automatic damages rule "without more" to substantiate either the existence of injury or the quantification of those injuries. To the contrary, it is indisputable that Mr. Tolokan's business was, in fact, injured by the substantial and continuing long term discriminatory advantage given to the favored Aldin station. Having met his burden of proving the fact of injury as a result of the discrimination, Mr. Tolokan's burden of precisely quantifying those damages is substantially lessened. *J. Truett Payne*, *supra*, at 566-567. Mr. Tolokan has also satisfied that burden.

Mobil's claim that a damages quantification that equates to the proven discrimination is condemned as "automatic damages", or that Tolokan attempts to apply

an "automatic damages" standard, are therefore unsupportable.

A determination by this Court is therefore required in order to clarify the question of whether those suffering price discriminations are barred from using the amount of the discrimination in order to quantify their damages when "more" than a mere mathematical computation is used, i.e. what did this Court mean when it stated "without more" in *Truett Payne, supra*, at 565-567.

CONCLUSION

For the reasons set forth herein, and within Petitioner's Brief, the Petitioner respectfully requests that a Writ of Certiorari be granted.

Dated this 22nd day of January, 1992.

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